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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 566

WARD TRANSPORT, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

MOTION TO AFFIRM.

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Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court appellee railroads[1] move the Court to affirm the judgment from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on which the

1. The Atchison, Topeka and Santa Fe Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago and North Western Railway Company; Chicago, Rock Island and Pacific Railroad Company; The Colorado and Southern Railroad Company; The Colorado & Wyoming Railway Company; The Denver and Rio Grande Western Railway Company; Missouri Pacific Railroad Company (Guy A. Thompson, Trustee); Union Pacific Railroad Company.

decision of the cause depends are so unsubstantial as not to need further argument.

In support of their motion these appellees respectfully show:

I.

Points 1 and 2 (page 9) of Appellants' Statement as to Jurisdiction raise the question as to whether the Commission's findings are supported by substantial evidence, particularly those findings relating to relative cost of service by rail and motor carrier.

The Commission had before it considerable evidence with respect to the relative costs of service of both modes of transportation but appellants' attack upon the Commission's findings is based upon the contention that the Commission should not have reached the conclusions which it did unless it had before it certain other types of evidence which the appellants contend the Commission should have had before it.

Included with the evidence which the Commission had before it was a cost analysis submitted by the motor carriers which showed that for distances beyond 75 miles in interstate operations the motor carrier rates are non-compensatory, that is, their costs exceed their rates. Along with such evidence the Commission had before it evidence more than sufficient to conclude that the proposed rail rates are compensatory. A necessary corollary of that finding is one that the rail costs are lower than the motor carrier costs for distances over 75 miles when consideration is given to the fact that both rail and motor carrier rates are on a parity.

It is true that the railroad appellees did not submit a detailed cost study purporting to show the precise cost of handling petroleum traffic in this area. An attempt to

make such a detailed cost analysis of this particular traffic over the lines of the appellee railroads between the origins and destinations involved would have been unnecessary and superfluous. To devote the time and expense necessary to making such a detailed cost study would not have revealed anything which the evidence does not already reveal with respect to the relationship of rail and truck costs for distances greater than 75 miles.

Appellee railroads contend that the evidence which the Commission has before it, including evidence physically introduced into the record and such evidence as the parties stipulated the Commission might refer to in reaching its decision was ample to support its conclusions.

The Commission had before it a comparison of the level of the proposed rates with other rates prescribed by it on the same commodities in other areas. By stipulation of the parties it had before it for consideration all the annual quarterly and monthly operating reports, the commodity reports, and the operating expense and revenue reports of the appellee railroads on file with the Commission. It had before it an exhibit showing revenue and expense statistics for each of the appellee railroads showing the cost of handling all traffic, including car-mile and ton-mile costs, and the cost of handling all traffic on an "added traffic" basis which is generally accepted to be about 50% of the average cost of handling all traffic. This exhibit showed that the costs of appellee railroads were only about one-half of the earnings which the proposed rates would produce. With the average earnings on this traffic being approximately double the cost of handling all traffic it is not necessary for the Commission to have a detailed cost analysis before it in order to come to the conclusion that the proposed rates are compensatory, or, in other words, that they are above costs. With the truck costs

being higher than their rates and the rail rates being above costs, there was sufficient evidence for the Commission to make the finding which it did.

It is not necessary in a proceeding of this kind that the Commission have before it evidence of the type and character for which appellants contend.

In *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, this Court said (page 481):

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the confidence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts. See *Manufacturers Railway Company* v. *United States*, 246 U. S. 457; *Assigned Car Cases*, 274 U. S. 564."

In *Motor Freight Express* v. *United States* (February 17, 1954), 119 Fed. Supp. 298 (District Court, M. D. Pennsylvania), the court said (page 305):

> "The question of the power of an administrative agency to draw inferences from proven facts was settled by *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793 (pages 800, 804-805). 'An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which led to the creation of such Boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration.

> • • • Like a statutory presumption or one established by regulation, the validity, perhaps in a varying degree, depends upon the rationality between what is proven and what is inferred.' Here there is obviously sufficient rational connection between what the Commission found to have been proved and what is inferred."

It was not even necessary for the Commission to make a finding with respect to relative costs of service in order to prescribe a differential of rail rates under truck rates. That matter was decided by this Court in *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216 (1951), where this Court said, at page 223:

> "Neither the Commission or this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate or differential."

In that same case, this Court also said at page 224:

> "The accommodation of the factors entering into rate structures, including competition, is a task peculiarly for the Commission." Citing *Ayrshire Corporation* v. *United States*, 335 U. S. 573, 593; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535-536.

Also in the same case this Court said, at pages 224-225:

> "Competition was adjudged by the Commission to be worth preserving. That judgment was legitimately rested on relevant factors other than lesser cost of service. • • • We do not say that relative costs, when properly supported by evidence, are not a matter to be considered, but we cannot say that the absence of that factor is fatal."

II.

Point 3 (page 11) of Appellants' Statement as to Jurisdiction is based on the contention that the Commission failed to make findings with respect to the effect of the approved rates on motor carrier traffic, contrary to the National Transportation Policy.

The allegation that the proposed rates will divert traffic from appellants goes to the question of the wisdom of the Commission's decision. As this Court said in *Interstate Commerce Commission* v. *Illinois Central Railroad Company*, 215 U. S. 452, 470, it is the power to make the order, not the wisdom of it that is the question. This Court has also stated on many occasions that it is not the court's function to weigh the evidence or consider the wisdom of the Commission's order when the court might have come to a different conclusion on the same evidence. *New England Divisions Case*, 261 U. S. 184, 204.

There is no rule of law nor any provision of the National Transportation Policy that requires the Commission to prohibit reductions in rates merely because such reduction may tend to attract traffic from other forms of transportation. There is no rule which prohibits the Commission from fixing minimum rates for rail carriers which are lower that the *costs* of competing motor carriers. There is nothing in the law which requires that rates of all forms of transportation must be the same as those of the highest cost agency.

If the rates are found not to violate any provisions of the Interstate Commerce Act, an order permitting such rates to become effective should not be enjoined merely because of a claim of damage on the part of the motor carriers. Rates are not unlawful merely because trucks assert the claim that they cannot meet such rates at a profit.

But of greater significance is what the record in this case shows as to fact versus speculation. What this record shows is the fact with respect to the effect of the parity of rates and speculation as to the effect of a differential. The fact is that the railroads cannot compete with the tank truck carriers in the territory under consideration on a parity of rates. The opinion—of the motor carriers—is that a differential will cause unwarranted diversion of traffic. But the evidence shows that a parity of rates does not provide equal opportunity for the competing forms of transportation fairly to seek the traffic in this area.

It is not necessary for the Commission to make findings on every argument and contention advanced by appellants.

The affirmative findings made by the Commission in its report completely took care of the alleged failure of findings contended for by the motor carriers.

In *Alabama Great Southern Railroad Company* v. *United States*, 340 U. S. 216, this Court said (page 227):

> "The Act does not require the Commission to make detail findings of fact, except in a case where damages are awarded. *Manufacturers Railroad* v. *United States*, 246 U. S. 457, 487, 489-490. The statute requires the Commission only to file a written report stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report."

It is not necessary for the Commission to make specific findings on every aspect of the National Transportation Policy in each and every case which comes before it. In fact, it is doubtful if it need made any findings at all on that subject. See *American Trucking Associations* v. *United States*, 344 U. S. 298. That case arose out of a Commission order prescribing certain rules for leasing of motor vehicles. In response to the contention that the order vio-

lated the National Transportation Policy, this Court said (page 313):

> "Regulation under the Act is there declared to be in the interests of the preservation of the inherent advantages of all modes of transportation, and of an economically sound, safe, and efficient industry. (Citing cases.) But no overly-nice distinction between law and policy is needed to support the view that the question is hardly one for the courts; it is clear that the rules represent, at best, a compromise between stability and flexibility of industry conditions, each alleged to be in the national interest, and we can only look to see if the Commission has applied its familiarity with transportation problems to these conflicting considerations."

Nevertheless, a reading of the Commission's report in this case demonstrates that the Commission was cognizant of the National Transportation Policy when it found that for distances up to 75 miles motor carriers had an inherent advantage, which, under such policy, must be preserved. The Commission further found that for distances beyond 75 miles motor carrier rates as low as rail rates result in unprofitable operations for the motor carriers. For the motor carriers to maintain rates so low as to be noncompensatory is not an "inherent advantage" which must be preserved. There is nothing in the National Transportation Policy which requires railroad rates to be maintained on a level which will insure continued unprofitable operations by motor carriers. For the Commission to countenance such a situation would have been contrary to the National Transportation Policy. What appellants are contending here, in effect, is that the National Transportation Policy requires the rates of all transportation agencies to be maintained at the level of the high cost agency.

III.

Point 4 (page 13) of Appellants' Statement as to Jurisdiction goes to the question of whether the record contains substantial evidence to support the Commission's finding that it is necessary for rail rates to be 1.5 cents lower than prevailing truck rates in order to make rail rates competitive with the truck rates.

Appellants here are merely seeking to have the court substitute its judgment for that of the Commission with respect to the conclusions reached from the evidence before it.

Appellants disagree with the Commission's judgment as to what are just and reasonable rates and want the court to substitute its judgment for that of the Commission.

Under a parity of rates the Commission found that rail carriers could not compete with motor truck service and that a differential under such truck rates was necessary.

The Commission had before it evidence that under the present parity of rates the motor carriers handled 90% of the traffic, that shippers by rail are under certain financial disadvantages created by the fact that they must furnish their own facilities for transportation including tank cars and places for the receipt and delivery of rail freight. Appellants contend that shippers will not pay a premium for motor carrier service but the record conclusively shows that the same shippers will not pay *as much* for rail service as they will for motor carrier service. Under these circumstances it is essential, and the Commission so found, that the rail rates must be differentially under motor carrier rates if the rail carriers are to compete for this traffic.

IV.

Point 5 (page 14) of Appellants' Statement as to Jurisdiction contains an assertion that the Commission's findings were based on evidence introduced in other proceedings. This assertion has no merit whatsoever.

Appellants state that "the final circumstance which shows the insubstantiality of the evidence to support the Commission's finding and order involves its recital in general terms of experience in other cases in other unnamed territories as grounds for the establishment of the 1.5 cent differential in favor of railroads in the territory involved."

The Commission did refer to the fact that in other territories where reduced rates have been filed to meet tank truck competition, the Commission has found as a fact that the railroads cannot compete successfully with the tank truck carriers at equal rates. However, in the instant case, the Commission's language clearly indicates that its decision rests upon findings based on the evidence in this case, as see the finding made on page 15 (page 42 of Statement) of the report:

> "* * * the record is convincing that in the territory here considered, the railroads cannot successfully compete with the motor carriers at equal rates, and that the proposed rates are not lower than necessary to meet the truck competition and are compensatory except for the shorter hauls."

Nothing could be clearer than this statement as evidence that the Commission's decision in this case rests squarely and wholly upon the findings based on the evidence presented in the record in the instant proceeding.

Appellants cite a portion of the lower court's decision dealing with that matter but fail to include the preceding sentences which throw an entirely different aspect on the

quote contained in the Statement as to Jurisdiction (p. 14) which is taken out of context.

The entire quote is as follows:

> "The plaintiffs further complain that the report improperly referred to and relied upon similar findings in similar proceedings which determined questions of competitive petroleum rates as between motor and rail carriers, but which were not involved in the instant proceeding. The Commission did refer to other like cases in its report, but in so doing it did not decide the instant case on facts established in the other cases. Its findings demonstrate that the factual basis for its order was the record before the Commission in the present case. The Commission is an expert body within its field. Part of that experience comes from its experience in previous cases. Certainly, in our opinion the Commission has the right to refer to experience in other cases as a guide for the application of its expert knowledge in a particular case. See *United States* v. *Peirce Auto Freight Lines, supra,* 327 U. S. at page 529."
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> "It is our conclusion that the findings of the Commission are based on the record in the instant case and are supported by substantial evidence; that the decision is not contrary to law and is in no respect arbitrary or capricious, and that the relief sought by the truck companies must be denied. Judgment will be entered accordingly."

Conclusion.

There was substantial evidence in the record to support the Commission's judgment in this case. Under such circumstances there is no substantial question presented for consideration by this Court and these appellees respectfully request that the decision of the lower court be affirmed.

Respectfully submitted,

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